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7 UNITED STATES OF AMERICA,
8 Plaintiff,
9 v.
10 BLAKE ROBERT JOHNSTON,
11 Defendant.

Case No. 4:14-cr-00545-JSW

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13 **ORDER DENYING MOTION TO**
14 **VACATE SENTENCE PURSUANT TO**
15 **28 U.S.C. § 2255 AND DENYING**
16 **CERTIFICATE OF APPEALABILITY**

17 Re: Dkt. No. 120

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19 Now before the Court for consideration is Blake Robert Johnston's ("Mr. Johnston")
20 motion to vacate, pursuant to 28 U.S.C. section 2255. The Government has filed an answer
21 opposing the motion. Mr. Johnston has filed a reply brief in support of the motion to vacate. The
22 Court has considered the parties' papers, relevant legal authority, and record in this case, and the
23 Court HEREBY DENIES the motion to vacate and DENIES a certificate of appealability.

24 **BACKGROUND**

25 On October 16, 2014, the Government charged Mr. Johnston with one count of travel with
26 intent to engage in illicit sexual conduct, in violation of 18 U.S.C. section 2423(b) ("Section
27 2423(b)"). (Dkt. No. 1, Compl. ¶ 22.) On April 2, 2015, the Government filed a superseding
28 indictment against Mr. Johnston with six additional counts.¹

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30 On December 1, 2015, Mr. Johnston entered a plea of guilty to one count of travel with

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¹ The additional counts included in the superseding indictment are: one count of
33 transportation of a minor with intent to engage in criminal sexual activity, in violation of 18
34 U.S.C. section 2423(a); one count of online enticement of a minor, in violation of 18 U.S.C.
35 section 2422(b); two counts of production of child pornography, in violation 18 U.S.C. section
36 2251(a), (e); one count of possession of child pornography, in violation of 18 U.S.C. section
37 2252(a)(4)(B); and one count of distribution of child pornography, in violation of 18 U.S.C.
38 section 2252(a)(2). (Dkt. No. 19, Superseding Indictment.)

1 intent to engage in illicit sexual conduct, pursuant to Federal Rule of Criminal Procedure
2 11(c)(1)(C). (Dkt. No. 45, Plea Agreement (“Agreement”).) Mr. Johnston admitted to facts
3 surrounding his travel to engage in illicit sexual conduct with a female he knew was fourteen years
4 old. (*Id.*, ¶ 2.) The Agreement expressly provided that the maximum prison term for violating
5 Section 2423(b) is 360 months imprisonment with no less than 120 months imprisonment. (*Id.*, ¶
6 8.)

7 Mr. Johnston also agreed “not to file any collateral attack on [his] conviction or sentence,
8 including a petition under 28 U.S.C. [section] 2255 or 28 U.S.C. [section] 2241, except that [he]
9 reserve[d] [his] right to claim that [his] counsel was ineffective in connection with the negotiation
10 of this Agreement or the entry of [his] guilty plea.” (*Id.*, ¶ 5.)

11 On April 5, 2016, the Court sentenced Mr. Johnston to 360 months imprisonment. Mr.
12 Johnston now seeks to vacate his sentence. Mr. Johnston argues that his counsel was ineffective
13 for not adequately representing Mr. Johnston’s interests at the sentencing hearing.

14 ANALYSIS

15 A. Standard of Review.

16 A prisoner in custody under sentence of a court established by Act
17 of Congress claiming the right to be released upon the ground that
18 the sentence was imposed in violation of the Constitution or laws of
19 the United States, or that the court was without jurisdiction to
20 impose such sentence, or that the sentence was in excess of the
maximum authorized by law, or is otherwise subject to collateral
attack, may move the court which imposed the sentence to vacate,
set aside or correct the sentence.

21 28 U.S.C. § 2255(a).

22 Section 2255 expressly provides, in pertinent part, that a district court shall grant an
23 evidentiary hearing “[u]nless the motion and the files and records of the case conclusively show
24 that the prisoner is entitled to no relief.” § 2255(b). An evidentiary hearing usually is required “if
25 the motion states a claim based on matters outside the record or events outside the courtroom.”
26 *United States v. Burrows*, 872 F.2d 915, 917 (9th Cir. 1989). However, denial without a hearing is
27 appropriate when the record “affirmatively manifest[s] the factual or legal invalidity of the
28 petitioner’s claims.” *Baumann v. United States*, 692 F.2d 565, 571 (9th Cir. 1982).

1 To justify an evidentiary hearing, the petitioner may not rely on “[m]ere conclusory
 2 statements.” *Id.* at 571. However, “the petitioner need not detail his evidence, but must only
 3 make specific factual allegations which, if true, would entitle him to relief.” *Id.* Thus, a court
 4 may deny a Section 2255 motion without hearing if “viewing the petition against the record, its
 5 allegations do not state a claim for relief or are so palpably incredible or so patently frivolous as to
 6 warrant summary dismissal.” *Id.*

7 The Court concludes an evidentiary hearing on Mr. Johnston’s claims is not warranted.

8 **B. The Court Denies the Motion.**

9 **1. Mr. Johnston Waived His Claims.**

10 The Government argues Mr. Johnston expressly waived the right to bring the claims
 11 asserted in his petition that challenge his sentence.² It is well established in the Ninth Circuit that
 12 a defendant can waive statutory rights in a plea agreement, including the right to collaterally attack
 13 a sentence. *United States v. Abarca*, 985 F.2d 1012, 1014 (9th Cir. 1992) (affirming waiver of
 14 right to petition for relief under 28 U.S.C. § 2255); *United States v. Navarro-Botello*, 912 F.2d
 15 318, 321 (9th Cir. 1990) (affirming waiver of right to appeal). The waiver is effective if it is both
 16 knowing and voluntary and encompasses the grounds raised by the defendant. *See Davies v.*
 17 *Benov*, 856 F.3d 1243, 1246-47 (9th Cir. 2017).

18 When Mr. Johnston pled guilty, he expressly agreed “not to file any collateral attack on
 19 [his] conviction or sentence, including a petition under 28 U.S.C. [section] 2255 or 28 U.S.C.
 20 [section] 2241, except that [he] reserve[d] [his] right to claim that [his] counsel was ineffective in
 21 connection with the negotiation of this Agreement or the entry of [his] guilty plea.” (Agreement ¶
 22 5.) Mr. Johnston does not dispute that his plea was entered knowingly and voluntarily.³ Further,

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 24 ² The Government also argues that even if Mr. Johnston’s ineffective counsel claims are not
 25 waived, they fail on the merits. The Government argues that Mr. Johnston fails to show that
 26 counsel’s performance was either deficient or that he suffered prejudice. *See Strickland v.*
Washington, 466 U.S. 668 (1984). This argument is discussed below.

27 ³ Additionally, there is no evidence that Mr. Johnston entered the Agreement involuntarily
 28 or without knowledge of its effects. In the Agreement, Mr. Johnston agreed to certain facts
 supporting a charge of travel with intent to engage in illicit sexual conduct. (Agreement ¶ 2.) Mr.
 Johnston then made affirmations that: he had adequate time with his attorney to discuss the case,
 the evidence, and the Agreement; he was not impaired by any alcohol, drug, or medicine that

1 Mr. Johnston's claims of ineffective counsel are all connected with sentencing, not the negotiation
2 of the Agreement or the entry of his guilty plea as provided for in the Agreement. Mr. Johnston
3 therefore waived his claims.

4 Mr. Johnston argues in his reply brief that a 2014 Department of Justice memorandum
5 mandates that prosecutors decline to enforce waivers for meritorious claims of ineffective
6 assistance of counsel.⁴ Because Mr. Johnston raises this new argument for the first time in his
7 reply brief, the Court need not consider it. *See, e.g., United States v. Wilde*, 74 F. Supp. 3d 1092,
8 1099-1100 (N.D. Cal. 2014), *aff'd*, 674 F. App'x 671 (9th Cir. 2017). The Court concludes that
9 Mr. Johnston's argument is, in any event, unpersuasive.

10 As authority for the proposition that this Court should decline to enforce the waiver in the
11 Agreement, Mr. Johnston cites an unreported decision of the Eleventh Circuit, *Murdock v. United*
12 *States*, 589 F. App'x 526, 527 (11th Cir. 2015) (per curiam). As such, *Murdock* is not binding on
13 this Court. Even so, Mr. Johnston overstates the scope of *Murdock*. There, the court directed the
14 Government to address its decision to enforce a waiver barring claims of ineffective assistance in
15 light of the Memorandum. The Government then voluntarily chose not to enforce the waiver.
16 *Murdock* does not hold that courts must direct the Government to consider the Memorandum nor
17 that courts must refuse to enforce waivers of ineffective assistance of counsel. Instead, *Murdock*
18 indicates only that the Government may, in its discretion, choose whether to enforce the waiver.

19 Further, to the extent that the Memorandum should be enforced, it is only applicable
20 "when defense counsel rendered ineffective assistance resulting in prejudice or when the
21 defendant's ineffective assistance claim raises a serious debatable issue that a court should
22 resolve." Memorandum. The Memorandum applies, therefore, only to meritorious ineffective
23 assistance of counsel claims. For the reasons stated below, Mr. Johnston has failed to state a

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26 would affect his understanding of the Agreement; the Agreement was made knowing the charges,
27 possible defenses, and the benefits and detriments of proceeding to trial; and the Agreement was
28 made voluntarily, without coercion or threat. (*Id.*, ¶¶ 18-20.)

27 ⁴ Memorandum from James M. Cole, Deputy Attorney General, For All Federal Prosecutors
28 (Oct. 14, 2014), available at <https://www.justice.gov/file/70111/download> (hereinafter
"Memorandum").

1 meritorious claim of ineffective assistance of counsel.

2 Accordingly, the Court concludes that Mr. Johnston has waived his right to bring this
3 motion and denies it on that basis. *See Davies*, 856 F.3d at 1246-47. If Mr. Johnston’s waiver
4 was ineffective, the Court would still deny the motion for failing to state a meritorious claim of
5 ineffective assistance of counsel.

6 **2. Mr. Johnston Cannot Show Ineffective Assistance of Counsel.**

7 To prevail on a claim of ineffective assistance of counsel, a petitioner must show both that
8 his counsel’s representation was deficient by an “objective standard of reason” and that he was
9 prejudiced. *Strickland*, 466 U.S. at 686-687. There is a strong presumption that counsel’s
10 behavior was reasonable. *Id.* at 689; *see also Babbit v. Calderon*, 151 F.3d 1170, 1173 (9th Cir.
11 1988) (relevant inquiry is whether choices made were reasonable, not what counsel could have
12 done). Counsel is afforded wide latitude in formulating trial tactics and strategy. *Hensley v. Crist*,
13 67 F.3d 181, 185 (9th Cir. 1995). Prejudice occurs only when “there is a reasonable probability
14 that, but for counsel’s unprofessional errors, the result of the proceeding would have been
15 different.” *Strickland*, 466 U.S. at 694. The Court need not consider one prong of *Strickland*,
16 either deficiency or prejudice, if there is an insufficient showing of the other. *Id.* at 697.

17 Mr. Johnston raises three claims of ineffective assistance of counsel. He argues that
18 counsel rendered ineffective assistance at the sentencing hearing because counsel: should have
19 presented sentencing statistics to show that a 360-month sentence was high in relation to similarly
20 situated offenders; should have called Mr. Johnston’s examining psychologist to the stand when
21 the Court rejected his report stating that Mr. Johnston was a low risk for recidivism; and should
22 have objected to the imposition of a fine. While it is unnecessary for a court to reach the issues of
23 deficiency and prejudice if one is dispositive, the Court concludes that Mr. Johnston is unable to
24 show that counsel’s performance was either deficient or prejudicial.

25 **a. Counsel’s Decision Not to Present Sentencing Commission Statistics.**

26 A court must consider “the need to avoid *unwarranted* sentence disparities among
27 defendants with similar records who have been found guilty of similar conduct.” 18 U.S.C. §
28 3553(a)(6) (emphasis added) (“Section 3553”). In addition to this factor, the court must also

1 consider numerous other factors set forth in Section 3553(a) and in the United States Sentencing
2 Guidelines that bear on whether a particular sentence is warranted. Mr. Johnston argues that if
3 counsel had presented sentencing statistics of similarly situated offenders, the Court may not have
4 sentenced Mr. Johnston to the statutory maximum. The Ninth Circuit has not directly addressed
5 whether failing to present sentencing statistics renders counsel ineffective. This Court is
6 persuaded by the Second Circuit's determination that as a general rule, sentencing statistics need
7 not be consulted because "there is 'no assurance of comparability.'" *United States v. Jenkins*, 854
8 F.3d 181, 193 (2d Cir. 2017) (quoting *United States v. Irving*, 554 F.3d 64, 76 (2d Cir. 2009)).

9 To satisfy *Strickland*'s first prong, counsel's representation must fall below an "objective
10 standard of reason." *Strickland*, 466 U.S. at 686-687. To show deficiency, Mr. Johnston
11 compares counsel's decision not to present sentencing statistics to the defendant's ineffective
12 counsel in *Wiggins v. Smith*, 539 U.S. 510 (2003). In *Wiggins*, counsel failed to present
13 background information about the defendant in a capital case that was easily available. Presenting
14 such background information in capital cases was also standard practice in the state. Taking at
15 face value Mr. Johnston's claims that pertinent sentencing statistics are easily available, Mr.
16 Johnston has still made no claim that presenting sentencing statistics is a standard practice.
17 Therefore, Mr. Johnston is unable to overcome the strong presumption that counsel's performance
18 was reasonable and so fails under the deficiency prong of *Strickland*. However, even if counsel's
19 failure to present sentencing statistics was deficient, Mr. Johnston could not show that he was
20 prejudiced.

21 To show prejudice, Mr. Johnston argues that his sentence was higher than similarly
22 situated offenders. He claims that his research of United States Sentencing Commission statistics
23 revealed 12 "identically situated offenders," namely those "sentenced under [U.S.S.G. section
24 2G1.3]⁵ with a final offense level of 32 in [Criminal History Category] I, pleaded guilty, and were
25 subject to a 360-month statutory maximum." (Mot. at 1:26-2:2.) Mr. Johnston then defines

27 ⁵ Mr. Johnston was sentenced using the United States Sentencing Guidelines Manual in
28 effect on November 1, 2015. (PSR ¶ 68.) All references to the United States Sentencing
Guidelines are to the guidelines in effect on that date, unless otherwise noted.

1 “similarly situated defendants” as “simply mean[ing] ‘defendants who have similar criminal
2 records and have been found guilty of similar conduct.’” (Reply at 10 (citing *United States v.*
3 *Plouffe*, 436 F.3d 1062, 1063 n.1 (9th Cir. 2001).) Taking Mr. Johnston’s definition at face value
4 and considering the twelve defendants to be similarly situated, Mr. Johnston nevertheless fails to
5 show that the sentence imposed was unwarranted. For instance, the Court noted at sentencing that
6 Mr. Johnston was subject to an upward departure under Section 2G1.3 cmt. n.7 for an offense
7 “involv[ing] ten or more minors.” (Dkt. No. 67, Sentencing Tr. at 34:25-35:6.) Mr. Johnston
8 offers no evidence that any of the twelve offenders referenced in the statistics were sentenced
9 based on similar facts.⁶

10 Mr. Johnston then cites *Jenkins* for the proposition that a “within-guidelines sentence [was]
11 substantively unreasonable where the Court neglected to consult readily available sentencing
12 statistics from the U.S. Sentencing Commission.” (Mot. at 4:10-13.) Mr. Johnston misapplies
13 *Jenkins*. As noted above, the court in *Jenkins* stated that, as a general rule, sentencing statistics
14 need not be consulted. *Jenkins*, 854 F.3d at 193. The court then distinguished the defendant, a
15 non-violent offender, from “the most dangerous offenders” who participate in online child-
16 pornography communities or “engage[] in any sexually dangerous behavior separate from [their]
17 crimes of conviction.” *Jenkins*, 854 F.3d at 190 (internal quotation marks omitted). By doing so,
18 the court found sentencing statistics instructive for showing that the sentence imposed on a non-
19 violent defendant was unreasonably high in relation to more dangerous defendants. *Jenkins*, 854
20 F.3d at 188-90. Unlike the facts in *Jenkins*, and as discussed below, the facts of this case do not
21 lend themselves to distinguishing Mr. Johnston from especially egregious offenders.

22 Mr. Johnston next claims that the court in *Jenkins* found U.S.S.G. section 2G2.2 (“Section

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24 ⁶ For example, Mr. Johnston’s research does not reveal whether the 12 defendants had a
25 similar number of victims as Mr. Johnston. The Court determined that the extent of Mr.
26 Johnston’s criminal activity warranted a sentence that would “reflect the seriousness of the
27 offense.” 18 U.S.C. § 3553(a)(2)(A). As of April 5, 2016, the Government identified “94 minor
28 victims who were enticed online by [Mr. Johnston] to engage in sexual activity, ranging in age
from about 12 to 17 years old, and coming from thirty two states and six different countries.”
(U.S. Sentencing Mem. at 3:6-9.) The Government also collected information that indicates Mr.
Johnston had “potentially more than 500 victims.” (Dkt. No. 124, Declaration of Lesley Brown in
Support of U.S. Sentencing Mem., ¶ 5.)

1 2G2.2") "irrational[]" because "nearly all those sentenced under [Section 2G2.2] received close to
2 the statutory maximum penalty." (Mot. at 4:14-22.) As a threshold matter, it is unclear why Mr.
3 Johnston criticizes Section 2G2.2 when this Court did not sentence Mr. Johnston under that
4 guideline. Even so, Mr. Johnston's reliance on the quoted text is misplaced. The court in *Jenkins*
5 was critical of the application of Section 2G2.2 only to the extent that it resulted in nonviolent
6 sexual offenders receiving higher sentences than the most dangerous offenders, such as those
7 "who intentionally seek[] out and contact[] a twelve-year-old on the internet, convince[] the child
8 to meet and to cross state lines for the meeting, and then engage in repeated sex with the child."
9 *Jenkins*, 854 F.3d at 189. However, travel with intent to engage in illicit sexual conduct, to which
10 Mr. Johnston pled guilty, is exactly the type of conduct the court in *Jenkins* suggests could warrant
11 a higher sentence. Therefore, Mr. Johnston fails to show that counsel's decision not to cite
12 sentencing statistics caused him prejudice.

13 For these reasons, the Court denies Mr. Johnston's first claim for ineffective assistance of
14 counsel.⁷

15 **b. Counsel's Decision Not to Call Mr. Johnston's Examining Psychologist
16 to the Stand.**

17 Mr. Johnston argues that if counsel had called Mr. Johnston's examining psychologist, Dr.
18 Lines, to the stand to defend his report that Mr. Johnston had a low risk of recidivism, he could
19 have received a lower sentence. In general, "[f]ew decisions a lawyer makes draw so heavily on

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21 ⁷ Mr. Johnston also argues that counsel should have notified the Court that a 360-month
22 sentence is a de facto life sentence. Mr. Johnston also makes no claim that presenting a sentence
23 as a life sentence is standard practice. Therefore, Mr. Johnston's cannot show that counsel was
24 inadequate by failing to present the 360-month sentence as a de facto life sentence. Even if
25 counsel was deficient, however, Mr. Johnston cannot show prejudice. As authority for the
26 proposition that this constituted prejudice, Mr. Johnston again cites *Wiggins* and *Jenkins*. This
27 Court does not find support for Mr. Johnston's claim in *Wiggins*, either in the non-precedential
28 syllabus to which Mr. Johnston cites or in the body of the opinion which addresses a habeas
petition regarding a death sentence. Similarly, *Jenkins* is not persuasive on the issue. In *Jenkins*,
the court criticized the Government for offering no justification for a lifetime of supervised
release, not prison. *Jenkins*, 854 F.3d at 195. Mr. Johnston, on the other hand, has agreed to a
lifetime of supervised release. (Sentencing Tr. at 29:22-30:5.) Moreover, the Court noted that Mr.
Johnston was a "danger to the community." (*Id.* at 33:16-17.) Thus, there is no reason to believe
that had the Court viewed the 360-month sentence as a de facto life sentence, it would have
imposed a lower sentence. Accordingly, Mr. Johnston fails to state a claim for ineffective
assistance of counsel.

1 professional judgment as whether or not to proffer a witness at trial.” *Lord v. Wood*, 184 F.3d
2 1083, 1095 (9th Cir. 1999). Strategic decisions, such as when to call a witness at sentencing, are
3 “virtually unchallengeable” after counsel has made a “thorough investigation of law and fact[.]”
4 *Strickland*, 466 U.S. at 690.

5 Mr. Johnston provides no evidence that failing to call Dr. Lines to the stand was deficient.
6 Both counsel and this Court closely analyzed Dr. Lines’ report. (Sentencing Tr. at 32:7-10.) After
7 counsel’s thorough presentation of Dr. Lines’ findings at the sentencing hearing, the Court
8 rejected the report’s conclusions. (*Id.* at 33:6-8.) Mr. Johnston argues that it would have been
9 easy to call Dr. Lines to the stand to defend the report, and that counsel’s failure to do so
10 constituted ineffective counsel. However, there is no case law to suggest that calling a witness to
11 the stand to present redundant testimony is constitutionally required. *Cf. Atwood v. Ryan*, 870
12 F.3d 1033, 1063 n.27 (9th Cir. 2017) (failing to produce additional documentation of defendant’s
13 drug use would have been redundant and was “neither deficient nor prejudicial”). Therefore, Mr.
14 Johnston cannot show that counsel’s assistance was deficient. Even if Mr. Johnston could show
15 that counsel was deficient, Mr. Johnston could not show that he was prejudiced.

16 There is no evidence that failing to call Dr. Lines to the stand prejudiced Mr. Johnston. Dr.
17 Lines’ report was used extensively in the Presentence Investigation Report (“PSR”). (PSR ¶¶ 105-
18 114.) Counsel also used Dr. Lines’ report extensively at sentencing to argue for a lower sentence
19 for Mr. Johnston. (Sentencing Tr. at 27:16-29:13.) Because the Court had already made a
20 thorough evaluation of the report and counsel had already vigorously defended it at sentencing, it
21 is unlikely that Dr. Lines’ defense of the report would have resulted in a lower sentence.
22 Therefore, Mr. Johnston fails to show that counsel’s decision not to call Dr. Lines to the stand at
23 sentencing prejudiced Mr. Johnston.

24 For these reasons, the Court denies Mr. Johnston’s second claim of ineffective assistance
25 of counsel.

26 **c. Counsel’s Decision Not to Object to the Imposition of a Fine.**

27 Mr. Johnston argues that if counsel had objected to the imposition of a fine of \$17,500 at
28 sentencing, he may have received no fine at all. He further argues that the imposition of a fine,

1 given his limited assets, would reduce his ability to pay restitution. The purposes of restitution
2 and fines are distinct. The purpose of restitution is to make the victims of crime whole. *United*
3 *States v. Hunter*, 618 F.3d 1062, 1064 (9th Cir. 2010). The purpose of a fine, on the other hand,
4 “is to punish the defendant, reflect the serious of the offense, promote respect for the law, and
5 deter future wrongful conduct.” *Nickles v. United States*, No. 14–00466, 2014 WL 12619771, at
6 *2 n.2 (C.D. Cal. July 24, 2014) (citing U.S.S.G. § 5E1.2(d)(2)). When determining the amount of
7 a fine to impose, a “court shall consider,” among other things, “any restitution or reparation that
8 the defendant has made or is obligated to make.” U.S.S.G. § 5E1.2(d)(4). If a defendant is
9 indigent and so “is not able” to pay the fine, a court may impose a fine less than the minimum
10 amount or waive it. § 5E1.2(e).

11 The applicable range for a fine for Mr. Johnston’s offense is from \$17,500 to \$175,000,
12 with a statutory maximum fine of \$250,000. U.S.S.G. §§ 5E1.2(c)(3), (h)(1); 18 U.S.C. §
13 3571(b).⁸ By imposing a fine of \$17,500, the Court limited the fine to the minimum
14 recommended amount under the Guidelines. The PSR indicated that Mr. Johnston had liquid
15 assets of \$16,000, total assets of \$30,000, along with financial resources from his mother, and
16 potential future access to a “large inheritance.” (PSR ¶¶ 121-22.) Because Mr. Johnston may
17 have access to significant assets following his release from prison, there is no reason to believe
18 that objecting to the imposition of any fine at all would have been successful. Cf. *United States v.*
19 *Seminole*, 882 F.2d 441 (9th Cir. 1989) (remanding issue of fine imposed on indigent defendant to
20 determine whether defendant would have “sufficient earning capacity to pay the fine following his
21 release from prison”) (citing U.S.S.G. § 5E4.2(d)(2) (1988)).⁹ Therefore, Mr. Johnston cannot
22 show that he was prejudiced because counsel failed to object to the imposition of any fine. Mr.
23 Johnston’s argument that the imposition of a fine would impede his ability to pay restitution is
24 unconvincing. Because restitution payments have priority over payments of a fine, Mr. Johnston

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26 ⁸ The Agreement further stipulates that the maximum fine for Mr. Johnston be no greater
27 than \$250,000. (Agreement ¶ 1.)

28 ⁹ U.S.S.G. section 5E4.2(d)(2) (1988) is substantially unchanged and currently published as
U.S.S.G. section 5E1.2(d)(2) (2015).

1 must pay restitution first. Therefore, the fine the Court imposed will not hinder Mr. Johnston's
2 ability to pay restitution. *See U.S.S.G. § 5E1.1(c)*. For these reasons, the Court denies Mr.
3 Johnston's third claim of ineffective counsel.

4 The Court concludes Mr. Johnston has failed to establish his claims for ineffective
5 assistance of counsel, and it DENIES his motion on that alternate basis as well.

6 **C. The Court Denies a Certificate of Appealability**

7 Rule 11(a) of the Rules Governing Section 2255 Proceedings requires a district court to
8 rule on whether a petitioner is entitled to a certificate of appealability in the same order in which
9 the motion is denied. Mr. Johnston has failed to make a substantial showing that his claims
10 amounted to a denial of his constitutional rights or demonstrate that a reasonable jurist would find
11 the denial of his claims debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).
12 Therefore, a certificate of appealability is not warranted in this case. Mr. Johnston may not appeal
13 the denial of a certificate of appealability, but he may seek a certificate from the Court of Appeals
14 under Federal Rules of Appellate Procedure 22. Rule 11(a) of the Rules Governing § 2255
15 Proceedings.

16 **CONCLUSION**

17 For the foregoing reasons, the Court DENIES Mr. Johnston's motion to vacate and
18 DENIES a certificate of appealability. The Court shall issue a separate judgment relating to this
19 motion, and the Clerk shall close the related civil case *Johnston v. United States*, No. 17-cv-
20 02227- JSW.

21 **IT IS SO ORDERED.**

22 Dated: June 25, 2019

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24 JEFFREY S. WHITE
United States District Judge
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